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Koperasi Perumahan Angkatan Tentera Bhd v Perangsang Tenggara Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-2549–12 OF 2018
LAU BEE LAN, RAVINTHRAN AND MOHD SOFIAN JJCA
22 OCTOBER 2021

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Contract — Termination — Notice of termination — Appellant and respondent entered into property management company and guaranteed revenue agreement — Respondent failed to pay revenue return as required under agreement — Appellant issued notice of termination — Whether notice of termination of agreement was lawful

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The appellant as the owner of a building known as Wisma KPAT ('the building') located on a plot of land in Bandar Shah Alam ('the land') had entered into a guaranteed revenue agreement dated 26 June 2010 ('the GRA') with the respondent for the purpose of renting out the building to third parties. The keys of the building were given by the appellant to one Nor Adli, the respondent's director on 14 April 2011. Due to difficulties in obtaining tenants, the appellant had accepted the respondent's proposal to convert the building into a hotel ('the project'). The appellant then entered into a hotel construction agreement ('the HCA') with Genessy Hills Sdn Bhd ('GHSB') for the purpose of the project. Subsequently, vide a property management company and guaranteed revenue agreement ('the PMC and GRA'), the appellant had appointed the respondent as an independent hotel management company to perform the services described in the PMC and GRA prior to the completion, during construction and after completion of the project. Under the PMC and GRA, the respondent was to pay the appellant an agreed revenue consisting of a fixed monthly sum of RM100,000 and percentage of the yearly net profit of the hotel business ('revenue return'). The payment of the revenue return was to commence upon vacant possession being given to the respondent as provided in cl 7 of the PMC and GRA. The respondent had begun generating revenue since 2016 but the respondent failed to pay the revenue return. Consequently, the appellant had issued a notice of termination dated 19 October 2017 and due to the failure of the respondent to make good of the breaches within the stipulated time, the appellant had terminated the PMC and GRA vide a letter dated 20 December 2017. Despite the termination, the respondent failed to return the vacant possession of the building and the land to the appellant, hence, the legal action against the respondent. The High Court had made an interim order for the respondent to vacate the hotel. At the end of the case, the learned judicial commissioner ('the JC') dismissed the appellant's action and held that the termination was unlawful. The JC further

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ordered for assessment of damages for unlawful termination of the PMC and GRA. Aggrieved by the said decision, the appellant filed the present appeal. The issue for consideration was whether the termination notice of the PMC and GRA by the appellant's solicitor dated 19 October 2017 was lawful or otherwise.

Held, allowing the appeal with costs of RM40,000 here and below to the appellant subject to allocatur and setting aside the judgment of the High Court:

(1) The learned JC had not considered cll 4(b) and 11(a) which confirmed the respondent's obligation arose prior to the completion, during construction and after completion of the hotel which in a commercial sense it could not be interpreted that the obligation would only arise after the hotel was completed and operating. The learned JC in interpreting cl 7 of the PMC and GRA had erroneously relied on a separate and distinct agreement namely the HCA as collateral agreement. Both the PMC and GRA and HCA were not part of the same transaction and served a different purpose and function. In addition, the respondent did not plead in its defence that the HCA was a collateral agreement, and it should be read together. Based on the above findings, the court held that the appellant's claim commenced from date of vacant possession was given to the respondent on 14 April 2011 under the GRA and had continued throughout the material time including on 26 July 2013 (see paras 35 & 38–40).

(2) It was not disputed that the respondent had been occupying the building throughout the material time when the PMC and GRA was signed and that the respondent had begun generating income, but the respondent failed to pay the revenue return as required under the PMC and GRA which led to the termination of the same. The learned JC erred in her findings that the notice of termination of the PMC and GRA by the appellant was not lawful. The reasons for the termination were contained in the notice of termination dated 19 October 2017, followed by another letter dated 20 October 2017 from the appellant's solicitor to the respondent and this was in compliance with cl 12(b) of the PMC and GRA (see paras 41–45).

(3) Based on the above findings, the court allowed general damages to be assessed by the registrar of the High Court in favour of the appellant to be computed 12 months from 25 July 2012 ie 26 July 2013 until the keys of the hotel were returned to the appellant ie 4 June 2018. The court however dismissed the appellant's claim for damages under cl 7 of the PMC and GRA because the provision was only applicable if the hotel was fully operational. Finally, the court set aside the order for assessment of

general damages that was made in favour of the respondent in the counterclaim because the termination by the appellant was lawful (see paras 46–48).

[Bahasa Malaysia summary

Perayu sebagai pemilik bangunan yang dikenali sebagai Wisma KPAT ('bangunan tersebut') yang terletak di sebidang tanah di Bandar Shah Alam ('tanah tersebut') telah menandatangani perjanjian jaminan hasil bertarikh 26 Jun 2010 ('GRA') dengan responden bagi tujuan untuk menyewakan bangunan tersebut kepada pihak ketiga. Kunci bangunan tersebut telah diberikan oleh perayu kepada seorang yang bernama Nor Adli, pengarah responden pada 14 April 2011. Disebabkan kesukaran untuk mendapatkan penyewa, perayu telah menerima cadangan responden untuk menukar bangunan tersebut menjadi sebuah hotel ('projek tersebut'). Perayu kemudiannya telah memeterai perjanjian pembinaan hotel ('HCA') dengan Genessy Hills Sdn Bhd ('GHSB') bagi tujuan projek tersebut. Setelah itu, melalui perjanjian syarikat pengurusan hartanah dan jaminan hasil ('PMC dan GRA'), perayu telah melantik responden sebagai syarikat pengurusan hotel bebas untuk melaksanakan perkhidmatan yang dinyatakan dalam PMC dan GRA sebelum siap, semasa pembinaan dan selepas siap projek. Berdasarkan PMC dan GRA, responden perlu membayar kepada perayu hasil yang dipersetujui yang terdiri daripada jumlah tetap bulanan RM100,000 dan peratusan keuntungan bersih tahunan perniagaan hotel ('pulangan hasil'). Pembayaran pulangan hasil bermula apabila milikan kosong diberikan kepada responden seperti yang diperuntukkan dalam klausa 7 PMC dan GRA. Responden telah mula menjana pendapatan sejak 2016 tetapi responden gagal membayar pulangan hasil tersebut. Akibatnya, perayu telah mengeluarkan notis penamatan bertarikh 19 Oktober 2017 dan disebabkan kegagalan responden untuk menebus pelanggaran tersebut dalam masa yang ditetapkan, perayu telah menamatkan PMC & GRA melalui surat bertarikh 20 Disember 2017. Walaupun perjanjian tersebut telah ditamatkan, responden masih gagal mengembalikan milikan kosong bangunan dan tanah tersebut kepada perayu, justeru, tindakan undang-undang telah diambil terhadap responden. Mahkamah Tinggi telah membuat perintah interim supaya responden mengosongkan hotel tersebut. Pada akhir kes, pesuruhjaya kehakiman yang bijaksana ('PK') menolak tindakan perayu dan berpendapat bahawa penamatan tersebut adalah menyalahi undang-undang. Pesuruhjaya kehakiman selanjutnya memerintahkan penilaian ganti rugi untuk penamatan PMC dan GRA yang menyalahi undang-undang. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu untuk pertimbangan adalah sama ada notis penamatan PMC dan GRA oleh peguam cara perayu bertarikh 19 Oktober 2017 adalah sah atau sebaliknya.

Diputuskan, membenarkan rayuan dengan kos RM40,000 diberikan kepada perayu di mahkamah ini dan mahkamah bawahan tertakluk kepada alokatur

dan mengetepikan penghakiman Mahkamah Tinggi:

(1) Pesuruhjaya kahakiman yang bijaksana tidak mempertimbangkan klausa 4(b) dan klausa 11(a) yang mengesahkan kewajipan responden timbul sebelum siap, semasa pembinaan dan selepas siap hotel yang dalam erti kata komersil ia tidak boleh ditafsirkan bahawa kewajipan tersebut hanya akan timbul selepas hotel siap dan beroperasi. Pesuruhjaya kehakiman yang bijaksana dalam mentafsir klausa 7 PMC dan GRA telah bergantung secara salah pada perjanjian yang berasingan dan berbeza iaitu HCA sebagai perjanjian kolateral. Kedua-dua PMC dan GRA dan HCA bukan sebahagian daripada transaksi yang sama dan mempunyai tujuan dan fungsi yang berbeza. Di samping itu, responden tidak memplid dalam pembelaannya bahawa HCA adalah perjanjian kolateral, dan ia harus dibaca bersama. Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa tuntutan perayu bermula dari tarikh milikan kosong diberikan kepada responden pada 14 April 2011 di bawah GRA dan telah diteruskan sepanjang masa material termasuk pada 26 Julai 2013 (lihat perenggan 35 & 38–40).

(2) Tidak dipertikaikan bahawa responden telah menduduki bangunan tersebut sepanjang masa material apabila PMC dan GRA ditandatangani dan bahawa responden telah mula menjana pendapatan, tetapi responden gagal membayar pulangan hasil seperti yang dikehendaki di bawah PMC dan GRA yang seterusnya membawa kepada penamatan perjanjian tersebut. Pesuruhjaya kehakiman yang bijaksana terkhilaf dalam dapatannya bahawa notis penamatan PMC dan GRA oleh perayu adalah tidak sah di sisi undang-undang. Sebab-sebab penamatan adalah terkandung dalam notis penamatan bertarikh 19 Oktober 2017, diikuti dengan surat yang lain bertarikh 20 Oktober 2017 daripada peguamcara perayu kepada responden dan ini mematuhi klausa 12(b) PMC dan GRA (lihat perenggan 41–45).

(3) Berdasarkan dapatan-dapatan di atas, mahkamah membenarkan tuntutan ganti rugi am yang akan dinilai oleh pendaftar Mahkamah Tinggi diberikan kepada perayu dikira 12 bulan daripada tarikh 25 Julai 2012 iaitu 26 Julai 2013 sehingga kunci hotel dipulangkan kepada perayu iaitu pada 4 Jun 2018. Mahkamah bagaimanapun menolak tuntutan perayu untuk ganti rugi di bawah klausa 7 PMC dan GRA kerana peruntukan tersebut hanya terpakai jika hotel tersebut beroperasi sepenuhnya. Akhir sekali, mahkamah mengetepikan perintah taksiran ganti rugi am yang diberikan kepada responden dalam tuntutan balas kerana penamatan oleh perayu adalah sah (lihat perenggan 46–48).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2009] 3 MLRA 1, FC (folld)

A *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649, CA (distd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)

B **Appeal from:** Civil Application No BA-22NCvC-8–01 of 2018 (High Court, Shah Alam)

Rajashree a/p Suppiah (Kuan Kai Tat with her) (Rajashree) for the appellant.
Mohd Munzeer bin Zainul Abidin (Adam Luqman Amdan with him) (Yusfarizal,
C *Aziz & Zaid) for the respondent.*

Mohd Sofian JCA:

INTRODUCTION

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[1] This is the appellant/plaintiff's appeal against the decision of the High Court after a full trial in dismissing the plaintiff's statement of claim and allowing the respondent/defendant's counterclaim for general damages with costs of RM30,000.

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[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

F **[3]** Having considered the appeal records and the submissions of the parties in the appeal, it is our unanimous decision that the appeal is allowed with costs. We now give our reasons for the same.

BACKGROUND FACTS

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[4] The plaintiff was the registered proprietor and legal owner of Wisma KPAT located at Lot 1, 1A-1 G and 3, 3A-3G, Pusat Perniagaan Suri Puteri, Persiaran Jubli Perak, Seksyen 20, 40300 Shah Alam, Selangor Darul Ehsan ('the building') on the land held under Suratan Hakmilik Strata No PN94676,
H Bangunan No M2, Tingkat No 1, Petak No 357, Lot No 1679, Seksyen 20, Bandar Shah Alam, Daerah Petaling, Negeri Selangor ('the land').

[5] In or around 2010, the plaintiff intended to invest on the development of the building for the interests of their members. A guaranteed revenue
I agreement dated 26 June 2010 ('the GRA') was entered into between the plaintiff and the defendant which contain the following terms:

(a) the plaintiff appointed the defendant *to rent out the building to third parties* with the intention that the revenue return from the rental of the building would be paid to the plaintiff; and

(b) on 14 April 2011, the plaintiff promptly gave the keys of the building to Nor Adli bin Suparman ('Nor Adli'), who was one of the directors of the defendant and *vacant possession* of the newly acquired building was thus given to the defendant. *(The building was certified to be occupied on 14 January 2011 and the vacant possession of the building was given to the plaintiff by the developer on 18 January 2011)*.

[6] In or around 2011, when there were difficulties obtaining tenants, the defendant proposed to renovate and convert the building into a hotel ('the project') and this proposal had been accepted by the plaintiff.

[7] In or around 2012, the plaintiff chose and appointed Genessy Hills Sdn Bhd ('GHSB') as the main contractor for the project and a hotel construction agreement ('HCA') was entered into between the plaintiff and GHSB. The defendant and the GHSB had common directors and shareholders and both were managed by Nor Adli.

[8] Subsequently on 25 July 2012, a property management company and guaranteed revenue agreement ('PMC and GRA') was entered into between the plaintiff and the defendant. Via the PMC and GRA agreement, the defendant was appointed as an independent hotel management company ('PMC') which took effect immediately during the construction period and as the *exclusive operator* and hotel management to perform the services described in the PMC and GRA prior to the completion, during construction and after completion of the project.

[9] The primary monetary obligation of the defendant under the PMC and GRA was to pay the plaintiff an agreed revenue consisting of a fixed monthly sum of RM100,000 and percentage of the yearly net profit of the hotel business ('revenue return'). The payment of the revenue return was to commence upon vacant possession being given to the defendant as provided in cl 7 of the PMC and GRA which stated as follows:

> 7 Revenue return
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> The parties hereby agree that in consideration of PTSB being appointed as PMC and the latter having the right to collect payment from the operation and business of the hotel and to earn profit and benefit from the said operation, PTSB shall pay to KPATB revenue return on yearly basis and in such an amount as set out in the *Second Schedule*. The first year payment of the revenue return shall commence from the *date full vacant possession* is given to PTSB notwithstanding whether PTSB has obtained the certificate of completion and compliance to the hotel to commence business and all other licenses related thereto subject to the same being applied for and rejected by the relevant authorities and also that all other facilities be fully in operation.

[10] In or around 2016, an opening ceremony (soft launch) of the hotel was held and the hotel had commenced operation and/or business under the name of 'Suunah Kekabu Resort Hotel' ('the hotel'). The hotel had begun generating an income or revenue since then. However, the plaintiff did not receive any benefit or payment of the contractually agreed revenue return from the defendant.

[11] The defendant failed and/or neglected to comply with the terms and conditions of the PMC and GRA, and therefore, committed various contractual breaches.

[12] Consequently, the *plaintiff gave the defendant a notice of termination of the PMC and GRA via letter dated 19 October 2017*. Upon the expiration of 60 days and the defendant failed to make good of the breaches, the plaintiff terminated the PMC and GRA by a letter dated 20 December 2017 and instructed the defendant to vacate the hotel upon the termination.

[13] The defendant ignored the notice dated 20 December 2017 and failed and/or neglected to return the vacant possession of the building and the land.

[14] The plaintiff commenced the legal proceedings against the defendant in early January 2018 and made an application for interim reliefs which is to retake possession of the hotel.

[15] In para 23 of the statement of claim, plaintiff prayed for the following:

> 23 Oleh yang demikian, plaintif memohon perintah seperti berikut:
>
> 23.1 bahawa defendan dan/atau pekerjanya dan/atau penamanya dan/atau wakil dan/atau agennya mengembalikan milikan kosong yang dipegang di bawah Suratan Hakmilik No PN94676, Bangunan No M2, Tingkat No 1, Petak No 357, Lot No 1679, Seksyen 20, Bandar Shah Alam, Daerah Petaling, Negeri Selangor ('tanah tersebut') dengan serta merta;
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> 23.2 bahawa defendan dan/atau pekerjanya dan/atau penamanya dan/atau wakil dan/atau agennya dihalang dari memasuki dan/atau terus menduduki, dan/atau terus menceroboh atas bangunan tersebut dan tanah tersebut;
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> 23.3 bahawa defendan dan/atau pekerjanya dan/atau penamanya dan/atau wakil dan/atau agennya dihalang dari meneruskan operasi dan perniagaan hotel di bangunan tersebut dan di atas tanah tersebut;
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> 23.4 satu injunksi mandatori bahawa defendan dan/atau pekerjanya dan/atau penamanya dan/atau wakil dan/atau agennya diarahkan untuk menyerahkan segala lesen, permit, kelulusan yang diperolehi sebagai PMC kepada plaintif dalam tempoh tiga hari dari tarikh perintah di sini;
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> 23.5 defendan diarahkan untuk menzahirkan buku-buku akaun, penyata kira-kira, penyata untung rugi dan semua rekod kewangan serta 'hotel occupancy records'

berkenaan dengan operasi hotel dan memberi perakaunan bagi menentukan kepulangan 20% daripada keuntungan bersih tahunan bagi tahun pertama dan tahun-tahun 2013, 2014, 2015, 2016 dan 2017;

23.6 defendan diarahkan untuk membayar kepada plaintif jumlah yang akan ditentukan sebagai kepulangan 20% daripada keuntungan bersih tahunan bagi tahun pertama dan tahun-tahun 2013, 2014, 2015, 2016 dan 2017;

23.7 defendan diarahkan untuk membayar kepada plaintif 'revenue return' tetap mulai Ogos 2013 sehingga Disember 2017 sebanyak RM5,300,000;

23.8 defendan diarahkan untuk membayar kepada plaintif denda yang dikenakan oleh pihak berkuasa sebanyak RM60,930;

23.9 defendan diarahkan untuk membayar kepada plaintif tunggakan bayaran penyelenggaraan bangunan tersebut ('maintenance fee') sebanyak RM68,814.72 setakat 30 September 2017;

23.10 gantirugi am yang akan ditaksirkan;

23.11 gantirugi bagi pencerobohan yang ditaksirkan oleh mahkamah mulia ini dari 20 Disember 2017 sehingga pencerobohan tamat;

23.12 gantirugi teladan ('exemplary damages') yang ditaksirkan oleh mahkamah mulia ini;

23.13 kos bagi tindakan ini alas dasar peguamcara dan klien;

23.14 faedah pada kadar atas gantirugi berkenaan daripada tarikh tindakan ini hingga ke tarikh penyelesaian penuh; dan

23.15 lain-lain relif yang mahkamah mulia ini fikirkan patut dan sesuai.

[16] On 30 May 2018, the High Court of Malaya in Shah Alam had made an interim order against the defendant and ordered the defendant to vacate the hotel.

[17] On 4 June 2018, the keys of the hotel were returned to the plaintiff.

DECISION OF THE HIGH COURT

[18] On 14 November 2018, at the conclusion of the trial, the learned judicial commissioner ('learned JC') found that the plaintiff had failed to prove their claim against the defendant and defendant had succeeded in part in their counterclaim.

[19] There are five issues that had been considered by the learned JC. The learned JC concluded, inter alia, in her grounds of judgment as follows:

(a) Persoalan disini apakah milikan kosong sepenuhnya yang dimaksudkan dalam klausa 7 PMC dan GRA dalam menjawab isu pembayaran *revenue return*. Dari penelitian saya, tiada definasi milikan kosong sepenuhnya yang diberi dalam PMC dan GRA yang mana ditafsir secara berbeza oleh

plaintif dan defendan. Dalam hal ini PMC dan GRA tersebut tidak memperuntukkan definisi dan/atau maksud 'milikan kosong'. Dalam ketiadaan definisi tersebut, adalah perlu dinilai dalam konteks perjanjian untuk mengenal pasti maksud sebenar 'milikan kosong'. Oleh itu dalam menentukan interpretasi ini, saya perlu melihat kepada niat dan tujuan sebenar *(true intention of the parties)* perjanjian PMC dan GRA dimasuki oleh kedua-dua pihak.

(b) Saya berpendapat PMC dan GRA dan HCA juga hendaklah dirujuk secara bersesama bagi mengetahui maksud sebenar terma-terma perjanjian secara keseluruhannya. HCA yang dimeterai diantara plaintif dan GHSB adalah satu perjanjian kolateral yang wujud 'side by side' dengan PMC dan GRA. Rujuk silang antara HCA dan PMC dan GRA hendaklah dibuat kerana kedua-dua perjanjian ini wujud serentak bagi mengawal selia 'subject matter' yang sama iaitu Wisma KPATB.

(c) Adalah jelas dari keterangan yang dikemukakan bahawa plaintif bercadang untuk membuat perniagaan perhotelan dan pulangan pendapatan adalah terhasil dari pendapatan sewaan bilik-bilik hotel. Manakala defendan pula diberi kuasa untuk mengurus hotel tersebut dan membayar revenue return mengikut kadar yang telah ditetapkan dan dipersetujui setelah hotel tersebut beroperasi dan mendapat pulangan.

(d) Saya mendapati adalah jelas dari klausa 7 PMC dan GRA bahawa defendan telah diberi hak untuk mengutip bayaran dari operasi dan perniagaan hotel dan untuk memperolehi keuntungan dan faedah dari operasi tersebut.

(e) Klausa 7 PMC dan GRA juga memperuntukkan bayaran *revenue return* bermula dari penyerahan milikan kosong oleh plaintif kepada defendan. Plaintif berpendirian bahawa tarikh milikan kosong penuh telah diserahkan kepada defendan pada 14 April 2011. Manakala sebaliknya defendan menegaskan kewajipannya untuk membuat bayaran *revenue return* belum berbangkit kerana milikan kosong penuh belum lagi diberikan kepadanya. Plaintif akan dapat keuntungan dari bayaran *revenue return* setelah pembinaan dan pengubahsuaian hotel disiapkan sepenuhnya oleh GHSB dan seterusnya milikan kosong penuh diserahkan kepada defendan setelah perniagaan perhotelan mula beroperasi. Dalam membuat interpretasi klausa 7 PMC dan GRA, saya akan melihat dari sudut milikan kosong dan *revenue return*.

(f) Plaintif dalam tuntutannya menyatakan bahawa milikan kosong penuh telah diberikan kepada defendan pada 14 April 2011 (iaitu ketika pihak-pihak memasuki GRR iaitu lebih kurang setahun sebelum PMC dan GRA tersebut dimeterai) adalah milikan kosong yang dimaksudkan dalam klausa 7 PMC dan GRA tersebut. Atas alasan ini, plaintif menghujahkan kiraan *revenue return* sudah bermula dari tarikh milikan kosong pada 14 April 2011 tersebut.

(g) Saya berpendapat bahawa milikan kosong yang diserahkan oleh plaintif kepada GHSB pada 14 April 2011 membawa maksud miilikan kosong

bagi tujuan kerja-kerja pengubahsuaian Wisma KPATB kepada hotel dan bukannya serahan milikan kosong hotel yang dimaksudkan di klausa 7 PMC dan GRA. Sejajar dengan HCA, milikan kosong tersebut akan diambil semula oleh plaintif setelah perakuan layak menduduki diperolehi. Serahan milikan kosong Wisma KPATB tersebut pada pendapat saya tidak lagi terpakai apabila plaintif dan defendan tidak meneruskan lagi GRR kerana milikan kosong bangunan itu diserahkan kepada GHSB untuk kerja-kerja pengubahsuaian dan pembinaan hotel dan tidak lagi terpakai dengan kewujudan PMC dan GRA.

(h) Adalah jelas juga bahawa PMC dan GRA merujuk kepada pengubahsuaian dan pembinaan hotel yang mana klausa 2 PMC dan GRA telah memperuntukkan definisi 'hotel completion' berkaitan dengan bangunan hotel. Oleh itu saya berpendapat bahawa 'hotel completion' membawa maksud bahawa hotel hanya boleh dikatakan siap apabila kerja-kerja pengubahsuaian dan pembinaan hotel tersebut oleh GHSB telah lengkap dan siap sepenuhnya serta diakui sah oleh arkitek yang dilantik.

(i) Saya tidak dapat menerima hujahan plaintif iaitu sekiranya kedua-dua pihak berniat untuk pembayaran *revenue return* bermula selepas 'hotel completion' maka perkataan ini hendaklah dinyatakan dalam klausa 7 PMC dan GRA tanpa menggunakan perkataan milikan kosong dari awal lagi. Di tahap ini saya berpendapat bahawa milikan kosong dalam klausa 7 PMC dan GRA tidak mungkin berlaku sebelum hotel completion. Apabila perkataan milikan kosong dinyatakan dalam klausa 7 PMC dan GRA, ianya semestinya membawa maksud milikan kosong merujuk kepada milikan kosong selepas 'hotel completion'. Dalam hal ini keterangan menunjukkan bahawa pembinaan hotel tersebut masih lagi belum disiapkan sepenuhnya oleh GHSB menurut HCA dan juga tidak memenuhi maksud 'hotel completion' di bawah klausa 2 PMC dan GRA dan dalam mengubahsuai Wisma KPATB sebagai sebuah hotel, plaintif telah melantik GHSB melalui surat tawaran (eksh P21) yang bertarikh pada 22 Jun 2012 diuruskan secara ekslusif oleh defendan.

(j) Persoalan sama ada pembinaan hotel tersebut siap atau pun tidak adalah bergantung kepada pengesahan oleh arkitek yang dilantik. Dari keterangan juga mendapati plaintif pada hakikatnya mengakui bahawa pembinaan hotel tersebut belum lagi siap sepenuhnya. lni dapat dilihat melalui surat plaintif kepada perbadanan pengurusan bangunan tersebut bertarikh 3 Januari 2017 (eksh D55) yang merayu untuk penangguhan kadar bayaran senggaraan. Melalui eksh D55, plaintif mengakui bahawa hotel tersebut belum lagi siap kerana pihak arkitek masih belum mengaku sah penyiapan hotel dengan beberapa sijil penyiapan masih dalam proses kelulusan dan operasi hotel masih terbatas dan tidak sepenuhnya.

(k) Oleh kerana hotel masih belum siap sepenuhnya dan milikan kosong masih belum diserahkan dan milikan kosong masih lagi dipegang oleh GHSB dan tidak bertukar tangan sehinggalah perintah injuksi interlokutori dilaksanakan oleh GHSB, maka saya memutuskan bahawa tidak ada pelanggaran yang dilakukan oleh defendan yang membolehkan

penamatan dibuat dibawah klausa 12(b) PMC dan GRA. Dengan ini, notis penamatan PMC dan GRA yang dibuat oleh plaintif dibawah klausa 12(b) adalah tidak sah.

(l) Pada pendapat saya proviso 'notwithstanding' dalam klausa 7 PMC dan GRA tidak terpakai dalam kes ini, cuma hanya digunapakai dalam keadaan sekiranya sijil atau kelulusan lambat diperolehi atau mengambil masa yang lama untuk dikeluarkan oleh pihak berkuasa yang berkenaan dengan syarat hotel tersebut sudah boleh beroperasi.

(m) Dalam memutuskan isu bilakah pembayaran *revenue return* berkuatkuasa, maka disini saya memutuskan bahawa bayaran *revenue return* tersebut masih belum berkuatkuasa kerana pembinaan hotel tersebut belum disiapkan dan milikan penuh masih lagi belum diserahkan kepada defendan. Dalam masa yang sama bayaran revenue return yang dimaksudkan dalam klausa 7 PMC dan GRA adalah berkaitan dengan perhotelan dan bukannya berkaitan dengan serahan milikan kosong Wisma KPATB kerana ini adalah bertepatan dengan hasrat dan tindakan kedua-dua pihak apabila memasuki perjanjian PMC dan GRA.

(n) Saya mendapati defendan tidak melanggar terma-terma PMC dan GRA dan defendan tidak mempunyai tanggungjawab untuk membayar *revenue return* selagi milikan kosong penuh tidak diberi mengikut perjanjian tersebut Oleh itu berdasarkan klausa 7 kewajipan untuk membayar *revenue return* hanya akan bermula dari tarikh milikan kosong sepenuh diberikan kepada defendan oleh plaintif yang mana ianya masih belum dilaksanakan. Dalam masa yang sama klausa 4(b) PMC dan GRA yang memperuntukkan mengenai tugas dan tanggungjawab defendan sebagai konsultan sebelum, semasa dan selepas pembinaan hotel tersebut tiada kaitan dengan pembayaran *revenue return*. Pada tahap ini defendan selaku konsultan hanya mempunyai tanggungjawab untuk menyelia dan selagi defendan belum mendapat milikan kosong, defendan tidak bertanggungjawab untuk membayar *revenue return* sebagaimana yang diperuntukan dalam klausa 7 PMC dan GRA.

(o) Selanjutnya dalam memutuskan isu mengenai pencerobohan oleh defendan, saya mendapati fakta menunjukkan bahawa operasi sementara hotel telah dijalankan oleh GHSB dan bukannya defendan. lni adalah kerana lesen hotel telah dipohon dan didaftarkan atas nama GHSB. Sekiranya plaintif beranggapan bahawa wujudnya suatu muslihat oleh defendan dan GHSB untuk mengelak dari obligasi dan tanggggungjawab dibawah klausa 7 PMC dan GRA, maka adalah wajar plaintif mengambil tindakan berasingan terhadap GHSB tambahan pula plaintif juga mengakui bahawa GHSB bukan pihak dalam tindakan ini. Walaupun GHSB dan defendan mempunyai 'common directors' tetapi kedua-dua syarikat ini adalah dua entiti yang berbeza dan mempunyai tanggungjawab untuk memenuhi terma-terma perjanjian yang berbeza.

(p) Saya berpendapat defendan tidak melakukan sebarang pencerobohan keatas hartanah kerana GHSB adalah pihak yang menduduki hotel tersebut dan bukannya defendan. Sekiranya defendan tidak mempunyai

apa-apa kaitan dengan operasi sementara hotel tersebut, konklusi mudah kepada isu ini adalah defendan tidak melakukan sebarang pencerobohan terhadap hartanah tersebut secara keseluruhannya. Dalam masa yang sama, defendan tidak mempunyai hak untuk menjalankan perniagaan hotel atas sebab belum menerima milikan kosong dan atas sebab hotel tersebut belum lagi siap mengikut kehendak perjanjian PMC dan GRA tersebut. Oleh yang demikian, tidak timbul isu pencerobohan oleh defendan apabila dari segi faktanya, defendan lansung tidak mempunyai apa-apa kaitan dengan operasi sementara hotel tersebut. Tuntutan plaintif untuk mengekalkan perintah interim injunksi ditolak dan dengan ini perintah interim injuksi tersebut dibatalkan. Gantirugi rugi bagi pencerobohan yang dituntut dari 20 Disember 2017 adalah ditolak.

(q) Bagi tuntutan plaintif untuk bayaran denda yang dikenakan oleh MBSA sebanyak RM60,930, mahkamah mendapati bahawa denda ini adalah berkaitan dengan pembinaan hotel yang melibatkan plaintif dan GHSB dan bukannya defendan. Klausa 5(b) PMC dan GRA memperuntukkan obligasi defendan untuk mendapatkan atau menguruskan semua permit, lesen dan kebenaran yang diperlukan dari pihak berwajib untuk membenarkan pembinaan hotel. Dalam hal ini plaintif menyatakan defendan telah memungkiri klausa 5(b) bila mana cuai untuk mendapat kelulusan pembinaan. Dari keterangan yang dikemukakan, walaupun notis amaran dikeluarkan oleh MBSA pada 2 April 2013 dan 26 April 2013, namun pembinaan masih tetap diteruskan sebelum pelan kelulusan dberi oleh MBSA. Tambahan pula pembinaan tersebut adalah di antara plaintif dan GHSB sebagai kontraktor yang mana plaintif semesti mempunyai pengetahuan penuh bahawa kerja-kerja pembinaan dan pengubahsuaian hotel tersebut telah dijalankan tanpa sebarang pelan kelulusan dari MBSA dan kedudukan ini juga disahkan oleh SP1. Atas alasan dinyatakan ini saya berpendapat plaintif adalah bertanggungan atas bayaran denda RM60,930 yang dikenakan dan bukannya defendan dan oleh yang demikian, tuntutan plaintif dibawah perenggan ini adalah ditolak.

(r) Bagi tuntutan penyelenggaran bangunan sebanyak RM68,814.72 setakat 30 September 2017. Plaintif mendakwa bahawa berdasarkan kepada klausa 5(f) PMC dan GRA, defendan hendaklah membayar caj utiliti dan melalui klausa 10 PMC dan GRA juga plaintif dikecualikan membayar cukai pintu dan penyelenggaraan. Dalam hal ini mahkamah mentafsirkan kedua-dua klausa ini adalah bayaran yang perlu dibuat oleh defendan selepas pembinaan hotel tersebut siap dan beroperasi mengikut klausa 2 PMC dan GRA dan ini juga diakui oleh SP1. Oleh yang demikian, memandangkan hotel belum siap dan beroperasi sepenuhnya, saya mendapati defendan tidak bertanggungjawab untuk membayar bil penyelenggaraan seperti yang dituntut oleh plaintif. Oleh itu tuntutan plaintif bagi penyelenggaran bangunan sebanyak RM68,814.72 adalah ditolak.

(s) Dapatan yang sama juga kepada tuntutan plaintif di perenggan-perenggan 23.5 dan 23.6 penyata tuntutan yang mana

defendan tidak mempunyai tanggungjawab sebagaimana klausa 6(b) PMC dan GRA untuk menyediakan penyata kewangan yang melaporkan kos hotel dan pendapatan yang diterima setiap tiga bulan kerana hotel masih lagi belum siap dan beroperasi dan masih lagi belum diuruskan oleh defendan selaku konsultan. Oleh yang demikian tuntutan dibawah kedua-dua perenggan ini ditolak.

(t) Dari keterangan dan fakta yang dikemukakan dari kedua-dua pihak, mahkamah atas imbangan keberangkalian mendapati plaintif telah gagal membuktikan tuntutannya terhadap defendan dan yang demikian menolak tuntutan plaintif di perenggan 23 penyata tuntutan.

(u) Berhubung tuntutan balas defendan iaitu sama ada defendan berhak kepada bayaran perkhidmatan sebagai konsultan pada kadar 12% daripada keseluruhan akhir perjanjian yang mana defendan telah membuat tuntutan balas memohon sejumlah RM2,513,849.22 sebagai fi bagi kerja-kerja yang dilaksanakan olehnya, klausa 7 PMC dan GRA dibaca bersama Jadual Kedua jelas menunjukkan bahawa defendan berhak untuk balasan dari keuntungan dan manfaat dari operasi dan perniagaan hotel menurut jumlah yang dinyatakan dalam Jadual Kedua PMC dan GRA. Sebagaimana yang diputuskan, kewajipan defendan untuk membuat bayaran *revenue return* belum berbangkit kerana milikan kosong sepenuhnya belum diserahkan kepada defendan dan perniagaan perhotelan belum beroperasi sepenuhnya maka defendan masih belum berhak kepada tuntutan. Malahan dalam hal ini defendan gagal untuk membuktikan bahawa plaintif telah bersetuju untuk membayar jumlah perkhidmatan sebagai PE pada kadar 12% daripada keseluruhan akhir perjanjian dan jumlah yang membawa kepada RM2,513,849.22 setakat 13 Oktober 2018. Alas alasan ini tuntutan balas defendan untuk fi tersebut adalah ditolak.

(v) Walaubagaimanapun defendan berhak terhadap gantirugi am untuk ditaksirkan bagi penamatan perjanjian yang tidak sah oleh plaintif.

(w) Gantirugi untuk ditaksirkan berlanjutan perintah interim injunksi bertarikh 30 Mei 2018 juga dibenarkan.

(x) Kos untuk tuntutan balas dibenarkan sebanyak RM30,000.

[20] Dissatisfied with the decision, the plaintiff filed this appeal.

THE APPEAL

[21] This appeal is premised on the following grounds as stated in the supplementary memorandum of appeal as follows:

1. The learned judge had erred in fact and in law in stating that the appellant entered into the 'property management company and guaranteed revenue agreement' dated 25 July 2012 ('PMC and GRA') and the hotel

construction agreement dated 25 July 2012 ('HCA') with Genessy Hills Sdn Bhd ('GHSB') to replace the guaranteed revenue return agreement dated 26 June 2010 ('GRR'). A

2. The learned judge had erred in fact and in law in not fully considering all of the respondent's obligations and duties under PMC and GRA in particular its obligation at the construction phase when it is expressed that the respondent's appointment is inclusive of duties prior to the completion, during construction and after completion of the hotel. B

3. The learned judge had erred in fact and in law in failing to recognize that the evidence showed that the hotel launching was done by the respondent through the respondent's director at all the material times. C

4. The learned judge had erred in fact and in law in failing to identify the appellant's claim properly and in mistakenly assuming that the appellant was claiming for payment of the revenue return from 14 April 2011 when the same contradicts the appellant's pleadings and prayers in the statement of claim. Further, the learned judge failed to appreciate that the appellant's claim in relation to the trespass was premised on the trespass to the building known as Wisma KPAT ('building') and the subject land at all material times and not merely the hotel which operated on the premises: D

5. The learned judge had erred in fact and in law in accepting the respondent's position that the hotel must be fully completed and operational before cl 7 of the PMC and GRA would take in effect notwithstanding the existence of the proviso to the said clause. E

6. The learned judge had erred in fact and in failing to accurately identify the roles of the parties and the witnesses in the proceedings. In particular, the learned judge failed to consider fully or at all that both parties were separately and independently represented by their own legal representatives or lawyers when the PMC and GRA were entered into. F

7. The learned judge had erred in fact in and in law in determining that the court had an obligation to look into the background and common intention of the parties in entering into PMC and GRA when parties' intention was to be discerned within the four corners of agreement in accordance to established principle of contractual interpretation. G

8. The learned judge had erred in fact and in law in interpreting cl 7 of the PMC and GRA and determining that the payment of the revenue return as being conditional on the operation and business of the hotel notwithstanding the existence of the proviso which expressly provides otherwise. H

9. The learned judge had erred in fact and in law in attempting to determine the true intention of the parties by disregarding the words used in the actual agreement ie the PMC and GRA in this instance. I

10. The learned judge had erred in fact and in law in holding that the PMC and GRA and HCA were collateral contracts.

11. The learned judge had erred in fact and in law in failing to hold that the PMC and GRA and the HCA involved different contracting parties and did not cross refer to each other.

12. The learned judge had erred in fact and in law in any event in applying the relevant provision and correct principles of the law on collateral contracts. Further, the learned judge had misconstrued and misapplied the rule of construction in the case of *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413 and failed to distinguish the *Glamour Green* case and the present case.

13. The learned judge had erred in fact and in law in going outside of the PMC and GRA to interpret a clause within the PMC and GRA.

14. The learned judge had erred in fact and in law in holding that the revenue return that was agreed upon only becomes payable after the hotel is operational and generates return. In other words, the learned judge had wrongly held that the unconditional fixed consideration in PMC and GRA was conditional upon the generation of revenue when that is not stated anywhere in the contract.

15. The learned judge had erred in fact and in law in failing to appreciate that the appellant had provided consideration on its part in providing the building and the land to the respondent and received no consideration and benefit in return from the time the contract was entered into.

16. The learned judge had erred in fact and in law in failing to appreciate and fully appreciate the fact that the proposal to convert the building into a hotel and to provide the guaranteed revenue return came from the respondent and that this was a business consideration/risk borne by the respondent as it is clear in the name of the agreement itself that the respondent had entered into a 'guarantee return agreement'.

17. The learned judge had erred in fact and in law in failing to consider or appreciate that the consideration provided for and expressed in the PMC and GRA is the 'right to collect payment' from the operational and business and the right to earn profit and benefit and not the actual collection itself.

18. The learned judge had erred in fact and in law in holding that the appellant's position was that the vacant possession under the PMC and GRA was delivered on 14 April 2011 whereas the appellant's true position and pleaded case was that vacant possession of the building and land was first given on and/or since 14 April 2011 and that the same was continuously held by the respondent throughout including on 25 July 2012.

19. The learned judge had erred in fact and in law and had completely misunderstood the appellant's position at trial as the appellant had never submitted or contended that the calculation of the revenue return commenced from 14 April 2011. At all material times, the appellant had only claimed from 25 July 2012.

20. The learned judge had erred in fact and in law in holding that the fact of the delivery of vacant possession being on the date of the PMC and GRA ought to have to been stated in the preamble if that was the intention of the parties when it is never the role scope or duty of judge to rewrite a contract. Instead it is the duty of judge to interpret a contract within the four corners of the written contract.

21. The learned judge had erred in fact and in law in misconstruing the evidence in SP1 and in failing to appreciate that the SP1 also give evidence that the possession was continuously held from 14 April 2011 until 25 July 2012. In any event the construction of a contract cannot be based on the subjective intention of any party and must be based on the objective intention approach since SP1 is no more than a lay witness.

22. The learned judge had erred in fact and in law in misconstruing delivery of vacant possession and delivery of site possession. Further, the learned judge had failed to appreciate that in any event site possession in GHSB had only been given for a period of 12 calendar months and GHSB had no right to occupy the premises indefinitely.

23. The learned judge had erred in fact and in law in misconstruing the notion and concept of 'vacant possession' and 'site possession' together with the right to occupy and the notion of fitness to occupy.

24. The learned judge had erred in fact and in law in failing to hold that if the parties had intended the revenue return ought to have commenced from the date of completion of the hotel this would have been stated expressly in the PMC and GRA instead of the term therein being subject to vacant possession together with the proviso.

25. The learned judge had erred in fact and in law in failing to consider that vacant possession of the building and the land could be delivered well before the hotel completion.

26. The learned judge had erred in fact and in law in holding that when the word 'vacant possession' is used in cl 7 of the PMC and GRA the same must mean vacant possession after 'hotel completion'. Subsequently all the learned judge's conclusions/findings concerning completion of the hotel, certificate of completion, architect's evidence ie evidence of SD2 was misconstrued and misapplied.

27. The learned judge had erred in fact and in law in equating the completion of the hotel to delivery of vacant possession in cl 7 of PMC and GRA and wrongfully held since the hotel was not completed therefore vacant possession could not be given to the respondent when it had been in fact given.

28. The learned judge had erred in fact and in law in holding that the hotel was not fully completed when it was in operation as a hotel and receiving paying guests since May 2016.

29. The learned judge had erred in fact and in law in failing to hold that the respondent's director under the cover of GHSB was indeed running the hotel.

30. The learned judge had erred in fact and in law in failing to appreciate that GHSB as a contractor had no right whatsoever to run the hotel in the appellant's building and on their land that the GHSB and the respondent were avoiding their liabilities by hiding under the veil of incorporation.

31. The learned judge had erred in fact and in law in holding that the termination under cl 12(b) of the PMC and GRA was wrongful.

32. The learned judge had erred in fact and in law in failing to construe the proviso correctly and refusing to accept the written term of the contract. In other words, the learned judge erred in rewriting the contract between the parties.

33. The learned judge had erred in fact and in law in holding that the obligation to pay revenue return under cl 7 of PMC and GRA was not connected to the delivery of vacant possession of the building, ie Wisma KPATB.

34. The learned judge had erred in fact and in law on her findings on the issue of trespass since the learned judge had failed to appreciate the respondent was simultaneously in the building with GHSB and was in fact maintaining its office in the office. In other words, the learned judge erred in not holding that the hotel and the building are physically the same subject matter. Upon termination, the respondent had no right to occupy both the hotel or the building notwithstanding the description applied.

35. The learned judge had erred in fact and in law in her application of the terms of PMC and GRA in relation to the other ancillary obligations of the respondent in respect of the hotel approvals, maintenance, utilities, record keeping and accounting.

36. The learned judge had erred in fact and in law in allowing damages to be assessed for the alleged wrongful termination by the appellant.

37. The learned judge had erred in fact and in law in allowing damages to be assessed pursuant to the setting aside of the interim injunction dated 30 May 2018 which contradicts the learned judge's own finding of facts that the respondent was not in the hotel and was not involved in the operation of the hotel at the material time and that the injunctive order was satisfied by GHSB.

SUBMISSIONS

[22] *The plaintiff* submitted as follows:

(a) when does the payment obligation for the revenue return arise? According to the plaintiff, the term on the payments for the revenue return is provided for in cl 7. Based on the plain reading of the cl 7, the

plaintiff took the stand that the payment obligation had arisen when the PMC and GRA was entered by the parties, that is as per the trigger event of vacant possession of the building and the land, which at the material time was with the defendant;

(b) the learned JC, by disregarding or discounting entirely the express proviso in cl 7 and deem it inapplicable, therefore, for all intent and purposes, rewrote the contract between the parties agreement;

(c) the learned JC also disregarded the existence of cll 4(b) and 11(a) both of which will confirm that the defendant's contractual obligation arose prior to the completion, during construction and after completion of the hotel which support the plaintiff's contention that the payment obligation cannot be treated differently;

(d) if parties intended for the delivery of vacant possession to take place after the 'hotel completion' as interpreted by the learned JC, then the defined terms of 'hotel' and/or 'hotel completion' would have been utilised by the parties and/or their respective solicitors in the contract;

(e) there should be no reliance to the doctrine of collateral contract in HCA to interpret the terms in the PMC and GRA because it is never the defendant's pleaded case and the defendant is not the contracting party in HCA;

(f) plaintiff's claim in respect of the payments for the revenue return is precisely in compliance with cl 7 and Second Schedule which ought to be read as integral terms of the PMC and GRA. the vacant possession of the building and the land was first given to the defendant on 14 April 2011 under the GRA and was continuously held by the defendant throughout the material time including on 25 July 2012;

(g) with the decision of the High Court, the defendant could escape their contractual obligation to pay the revenue return purportedly since the hotel was not yet completed and Nor Adli, the director of the defendant (under the corporate entity of GHSB), could operate and run the hotel business in the plaintiff's property and pocket all income and revenue earned in the building and land entrusted to and under the management of the defendant under the PMC and GRA; and

(h) the learned JC had erred by allowing the damages to the defendant to be assessed after setting aside the interim injunction order dated 30 May 2018. This order for damages had either been made contrary to her own findings or had been made in vain since no part of the interim order affected or caused damage to the defendant who was purportedly not in occupation or possession at the material time ie 'kerana GHSB adalah pihak yang menduduki hotel tersebut dan bukannya defendan' as per the finding and decision of the learned JC herself.

[23] *The defendant* submitted as follows:

(a) the defendant took the stance that the payment obligation had not arisen since the vacant possession of the hotel had not been handed over;

(b) based on cl 7 of the PMC and GRA, it is clear that the defendant is obligated to pay revenue return to the plaintiff. However, such obligation only accrues after the defendant being given vacant possession of the said hotel as clearly ascribed in cl 7 of the PMC and GRA when it says 'shall commence from the date of full vacant possession is given to PTSB';

(c) defendant therefore submitted that the line of argument taken by the plaintiff is rather misconceived and nonsensical. There is no way that vacant possession in the PMC and GRA would mean vacant possession that allegedly happened on 14 January 2011 of which had correctly held by the learned JC. In so determining, the learned judge had considered the following reasons:

(i) it defies business logic;

(ii) the GRA is already replaced and superseded by the PMC and GRA;

(iii) admission by the plaintiff's main witness who had expressly admitted that the vacant possession as claimed to be taken place in 14 January 2011 is exclusively for the GRA only; and

(iv) argument relating to vacant possession on 14 January 2011 is a made up;

(d) in the present facts, the PMC and GRA did not expressly define what vacant possession is. In so determining the disputed term, court may exercise its power to look into the general background and surrounding circumstances of the PMC and GRA in order to determine the real, correct and more sensible interpretation of the word 'vacant possession'. that is exactly what has been done by the learned JC in giving her final judgment. In the absence of express definition of vacant possession, Her Ladyship had looked into the factual matrix and background that led into concluded transaction between parties in determining the true intention of parties. The learned JC therefore had correctly referred to guidelines laid down by the Federal Court cases; and

(e) furthermore, based on cl 11(a) of the construction agreement and cl 7 of the PMC and GRA, there shall be transfers of vacant possession of the said building involving the plaintiff, the defendant and GHSB.

OUR DECISION

[24] The court below had thoroughly dealt with the facts in this case as adumbrated in the learned JC grounds of judgment. Hence we need only to highlight the relevant and pertinent facts for the purposes of this appeal.

[25] The pivotal issue in this appeal is whether the termination notice of the PMC and GRA by the plaintiff's solicitor dated 19 October 2017 was lawful or otherwise. The reasons for the termination are contained in the notice of termination dated 19 October 2017. Upon the expiration of 60 days and the defendant failed to make good the breaches, the plaintiff terminated the PMC and GRA by a letter dated 20 December 2017 and instructed the defendant to vacate the hotel upon the termination.

[26] The termination notice was issued by the plaintiff to the defendant on the basis that the defendant had breached cl 7 of PMC and GRA dated 25 July 2012.

[27] The defendant under the PMC and GRA was to pay the plaintiff an agreed revenue consisting of a fixed monthly sum of RM100,000 and percentage of the yearly net profit of the hotel business ('revenue return'). The payment of the revenue return was to commence upon vacant possession being given to the defendant as provided in cl 7 of the PMC and GRA.

[28] It was the contention of the plaintiff that on the plain and literal reading of cl 7 of PMC and GRA the obligation of the defendant had arisen on the date the PMC and GRA was signed and vacant possession of the building and the land which at the material time was with the defendant.

[29] The learned JC however was of the view that the obligation to pay the plaintiff pursuant to cl 7 of PMC and GRA had not arisen since the hotel had not been fully completed and the vacant possession of the fully completed hotel had not been given to the defendant.

[30] The learned JC was of the further view that the vacant possession mentioned in cl 7 of PMC and GRA could not take place until the hotel was completed.

[31] As for the renovation of the said buildings into a hotel, an agreement namely 'hotel construction agreement dated 25 July 2012 was signed between the plaintiff and Genessy Hills Sdn Bhd ('GHSB') whereby GHSB was

A appointed the main contractor for the renovation works. This agreement is quite separate from the PMC and GRA between the plaintiff and the defendant.

B **[32]** It is instructive to refer to the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2009] 3 MLRA 1,where the Federal Court held as follows:

> [42] In interpreting a contract, the court is not confined to the four corners of the document, but it should also look at the factual matrix which forms the background to the transaction, including all material that was reasonably available to the parties. The interpreting court must disregard any part of the background that is declaratory of subjective intent only objective approach should be adopted in interpreting the contract.

C

D **[33]** The Federal Court further held as follows:

> [10] The role of the court is to interpret the contract in a sensible fashion. See, *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; [1987] 1 MLRA 519. As Lord Steyn said in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, p 771:
>
> E In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile
> F to technical interpretation and undue emphasis on niceties of language. In contradiction to this modern approach, Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic.

G **[34]** In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 the Federal Court held, inter alia, that 'when one has to choose between two competing interpretations, the one which made more commercial sense should be preferred if the natural meaning of the words was unclear'.

H **[35]** We are of the view that the learned JC had not considered cll 4(b) and 11(a) which confirmed the defendant's obligation arose prior to the completion, during construction and after completion of the hotel which in a commercial sense it cannot be interpreted that the obligation will only arise after the hotel is completed and operating.

I **[36]** For ease of reference cl 4(b) is hereby reproduced which states as follows:

> Relying on the foregoing representation and warranty, KPATB hereby appoints PTSB as an exclusive operator and hotel management and maintenance, marketing, planning, appoint workers all other ancillaries works to run the hotel and/or to do

> hotel business and/or any other similar to hotel business to earn revenue and/or profit and/or income from it as prior to the completion, during construction and after construction of the hotel and PTSB agrees to perform its obligations under this agreement with the due diligence and care of a professional PMC and with the necessary design, construction, cost control and management expertise and experience on hotels of similar magnitude and complexity and as would a prudent owner all in accordance with the terms of this agreement. KPATB acknowledges and agrees that, without in any way diminishing the responsibilities of PTSB hereunder, any of the duties to be carried out by PTSB under this agreement may be carried out by any person engaged by PTSB as PTSB reasonably considers appropriate.

Clause 11(a) states, inter alia, as follows namely: '... PTSB hereby be appointed as an independent hotel management company (PMC) immediately during the construction period and as the exclusive operator and hotel management to perform'.

[37] The word 'hotel completion' had been used in other clauses in the PMC and GRA but it was not referred to in cl 7 thereof. Hence it was the contention of the plaintiff that if it was the intention of parties that the obligation of the defendant to pay arose upon the completion of the hotel, then it would have appeared in cl 7.

[38] The learned JC in interpreting cl 7 of the PMC and GRA had erroneously relied on a separate and distinct agreement namely the hotel construction agreement as collateral agreement. Both the PMC and GRA and HCA are not part of the same transaction and served a different purpose and function. The facts in *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649 are distinguishable with the facts in the instant case. The principle in *Glamour Green* is applicable where there is one transaction.

[39] The learned JC had addressed her mind to the HCA and formed the view that it was a collateral agreement. However, we observe that the defendant did not plead in its defence that the HCA is a collateral agreement and it should be read together. It is not part of the defendant's pleaded case.

[40] In the premises, we are of the considered view that the plaintiff's claim commenced from date of vacant possession was given to the defendant on 14 April 2011 under the GRA and had continued throughout the material time including on 26 July 2013.

[41] It was not in dispute that the defendant had been occupying the said building throughout the material time when the PMC and GRA was signed

and more importantly when the hotel had a soft launch in mid-2016 to signify the opening of the hotel operation and/or business under the name of 'Suunah Kekabu Resort Hotel'.

[42] From that moment onwards, the hotel had begun to generate income but the plaintiff did not receive any benefit or payment of the contractually agreed revenue return from the defendant.

[43] Consequently, the plaintiff gave the defendant a notice of the defendant various breaches and a notice of termination of the PMC and GRA via letter dated 19 October 2017.

[44] Upon the expiry of the 60 days, and the defendant's failure to make good of the various breaches, the plaintiff terminated the PMC and GRA by a letter dated 20 December 2017 and to vacate the building upon the termination.

CONCLUSION

[45] We find that there are merits in the appeal. We are of the considered view that the learned JC erred in her findings that the notice of termination of the PMC and GRA by the plaintiff was not lawful. The reasons for the termination are contained in the notice of termination dated 19 October 2017, followed by another letter dated 20 October 2017 from the plaintiff's solicitor to the defendant and this is in compliance with cl 12(b) of the PMC and GRA.

[46] We allowed general damages to be assessed by the registrar of the High Court in favour of the plaintiff to be computed 12 months from 25 July 2012 ie 26 July 2013 until the keys of the hotel were returned to the plaintiff ie 4 June 2018.

[47] We however dismissed the plaintiff's claim for damages under cl 7 of the PMC and GRA because in our view, the provision only applies if the hotel is fully operational.

[48] We set aside the order for assessment of general damages that was made in favour of the defendant in the counterclaim because the termination by the plaintiff was lawful.

[49] In the upshot, we allowed the appeal of the plaintiff with costs and the judgment of the High Court dated 14 November 2018 is set aside. We award costs of RM40,000 here and below to the plaintiff to be paid by the respondent, subject to allocatur.

Appeal allowed with costs of RM40,000 here and below to appellant subject to allocatur; High Court's judgment set aside.

Reported by Dzulqarnain bin Ab Fatar